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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLARISSA C. CORTEZ,
Plaintiff,
v.
NEW CENTURY MORTGAGE CORPORATION,
et al.,
Defendants.

No. C 11-1019 CW

ORDER GRANTING
DEFENDANT PACIFIC
MORTGAGE
CONSULTANTS'
MOTION TO DISMISS

Defendant Pacific Mortgage Consultants, Inc. (Pacific) moves to dismiss all the claims alleged against it in Plaintiff's complaint. Pro se Plaintiff Clarissa Cortez opposes the motion.¹ The motion was taken under submission and decided on the papers. Having considered all the papers filed by the parties, the Court grants Pacific's motion to dismiss.²

¹ Pacific argues that the Court should not consider Plaintiff's opposition because it was filed one week after the Court-ordered deadline. The Court will consider Plaintiff's opposition.

² Pacific's request for judicial notice is granted. See Fed. R. Civ. P. 12(d); Mir v. Little Co., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of matters of public record without converting motion to dismiss into motion for summary judgment).

1

BACKGROUND

2 On January 21, 2011, Plaintiff filed this mortgage-related
3 case in state court and, on March 4, 2011, Defendant Saxon
4 Mortgage Services, Inc. (Saxon) removed it to federal court. On
5 November 3, 2011, this Court issued an Order Granting in Part
6 Saxon's Motion to Dismiss, in which it dismissed all but one claim
7 Plaintiff asserted against Saxon. The following are the facts
8 that are relevant to Pacific's motion to dismiss.

9 In 2002, Plaintiff financed the purchase of her residence
10 located at 2609 Covelite Way, Antioch, California with a loan in
11 the amount of \$288,100 from America's Wholesale Lender. See
12 Request for Judicial Notice (RJN), Ex. D. In January 2004,
13 Plaintiff refinanced the loan with an adjustable rate loan in the
14 amount of \$387,000 from New Century Mortgage. See RJN, Ex. E. In
15 June 2004, Plaintiff refinanced the loan with an adjustable rate
16 mortgage in the amount of \$443,207 from Loan Management Services,
17 Inc. See RJN, Ex. F. On August 23, 2005, Plaintiff refinanced
18 the loan with an adjustable rate mortgage in the amount of
19 \$560,000 from New Century Mortgage. See RJN, Ex. G. This is the
20 loan that is the subject of this litigation. The subject loan was
21 secured by a deed of trust that had an Adjustable Rate Rider
22 disclosing that the loan payments were interest-only for five
23 years and that the interest rate was locked for two years. Id. at
24 17. The Adjustable Rate Rider, dated August 23, 2005, was signed
25 by Plaintiff and indicated that the loan had an initial interest
26 rate of 6.2 percent and provided for changes in the interest rate
27 and monthly payments as follows:

28

1 4. Interest Rate and Monthly Payment Changes

2 (A) The interest rate I will pay may change on the first day
3 of September, 2007 and on the same day of every 6th month
4 thereafter. Each date on which my interest rate could change
5 is called an "Interest Rate Change Date." Id.

6 (B) Beginning with the first Interest Rate Change Date, my
7 interest rate will be based on an Index plus a margin. The
8 "Index" is the average of interbank offered rates for six-
9 month dollar deposits in the London market (LIBOR), as
10 published in the Wall Street Journal "Money Rates" Table.

11 . . .
12 (C) Calculation of Changes

13 On each Interest Rate Change Date, the Note Holder will
14 calculate my new interest rate by adding five and three-
15 quarters percentage points (5.750%) to the Current Index.
16 . . . Subject to the limits stated in Section 4(D) below,
17 this amount will be my new interest rate until the next
18 Interest Rate Change Date.

19 . . .
20 (D) Limit on Interest Rate Changes

21 The interest rate I am required to pay at the first Change
22 Date will not be greater than 7.700% or less than 6.200%.
23 Thereafter, my interest rate will never be increased or
24 decreased on any single Interest Rate Change Date by more
25 than one and one half percentage points (1.5%) from the rate
26 of interest I have been paying for the preceding month. My
27 interest rate will never be greater than 13.200% or less than
28 6.200%.

29 The complaint alleges that Pacific was the mortgage broker on
30 the subject loan. Comp. ¶ 7. Paragraphs 15 and 16 contain
31 general allegations about mortgage brokers, as follows:

32 For years, mortgage brokers and lenders have been selling
33 loan products that they knew or should have known would never
34 be able to be repaid by the borrower and would prevent
35 borrowers from ever actually owning the home. Instead,
36 borrowers were offered interest-only, negative amortization,
37 and/or other subprime loan products that amounted to no more
38 than a short term lease until the payments became so

1 unaffordable that the borrowers are now faced with either
2 bankruptcy or foreclosure. . . .

3 The loan product sold to Plaintiff in this case was exactly
4 the kind of loan that has contributed to our national
5 problem. The Defendants were aware of this trend, and
6 possessed the foresight to advise Plaintiff of this risk.
7 They intentionally concealed the negative implications of the
8 loan they were offering, and as a result, Plaintiff faces the
9 potential of losing [her] home to the very entity and
10 entities who placed [her] in this position.

11 Under Plaintiff's Truth in Lending Act claim, she alleges
12 that Pacific, along with the lender, New Century Mortgage
13 Corporation,

14 shuffled Plaintiff in, had Plaintiff sign on the dotted line,
15 and shuffled Plaintiff out. Never was Plaintiff even given
16 the required documents so that [she] could conduct [her] own
17 due diligence to find out what exactly this adjustable rate
18 mortgage was going to turn into. . . . Plaintiff is a
19 layperson, and does not have a good command of the English
20 language (Tagalog is her native language, not English). The
21 representative at New Century and Pacific painted a very rosy
22 picture for Plaintiff, and convinced [her] that [she was]
23 more than able to afford the home [she] was applying for.
24 . . . It wasn't until recently when Plaintiff's payments
25 changed dramatically that she realized what she had gotten
26 herself into.

27 Comp. ¶ 75.

28 **LEGAL STANDARD**

29 A complaint must contain a "short and plain statement of the
30 claim showing that the pleader is entitled to relief." Fed. R.
31 Civ. P. 8(a). When considering a motion to dismiss under Rule
32 12(b)(6) for failure to state a claim, dismissal is appropriate
33 only when the compliant does not give the defendant fair notice of
34 a legally cognizable claim and the grounds on which it rests.

35 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In

1 considering whether the complaint is sufficient to state a claim,
2 the court will take all material allegations as true and construe
3 Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
4 principle is inapplicable to legal conclusions; "threadbare
5 recitals of the elements of a cause of action, supported by mere
6 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
7 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
8 U.S. at 555).

9 When granting a motion to dismiss, the court is generally
10 required to grant the plaintiff leave to amend, even if no request
11 to amend the pleading was made, unless amendment would be futile.
12 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
13 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
14 amendment would be futile, the court examines whether the
15 complaint could be amended to cure the defect requiring dismissal
16 "without contradicting any of the allegations of [the] original
17 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
18 Cir. 1990).

21 DISCUSSION

22 In her complaint, Plaintiff alleges twenty-four causes of
23 action, which are listed in the Court's November 3, 2011 Order.
24 Her allegations distinguish only minimally the conduct undertaken
25 by the four named Defendants. The Court will address only those
26 claims that are relevant to Pacific as Plaintiff's mortgage
27 broker. Under California law:

A mortgage loan broker is customarily retained by a borrower to act as the borrower's agent in negotiating an acceptable loan. All persons engaged in this business in California are required to obtain real estate licenses. Thus, general principles of agency combine with statutory duties created by the Real Estate Law to impose upon mortgage loan brokers an obligation to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. . . . A real estate licensee is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.

UMET Trust v. Santa Monica Medical Investment Co., 140 Cal. App. 3d 864, 869 (1983).

I. Res Judicata

Pacific argues that Plaintiff's entire complaint is precluded by the previous dismissal with prejudice of claims against Defendant Saxon Mortgage Services, Inc. (Saxon) in a prior case, Cortez v. New Century Corp., C 10-4631 RS, Docket No. 25.

Plaintiff does not respond to this argument.

In case number C 10-4631 RS, Plaintiff sued several defendants, including Pacific and Saxon. Saxon was the only defendant that filed a motion to dismiss. The court granted Saxon's motion to dismiss with prejudice, stating, "Plaintiff filed no opposition to [Saxon's] motion and did not appear at the hearing. The motion is granted, without leave to amend, on the grounds that the complaint fails to state a claim against Saxon, and that the purported claims are barred by the applicable statute of limitations." After this order was filed, Plaintiff did not respond to any orders of the court. The court subsequently dismissed Plaintiff's entire complaint, including the claims

1 against Pacific, without prejudice for failure to prosecute. See
2 C 10-4631 RS Docket No. 28.

3 Pacific argues that, pursuant to the doctrine of res
4 judicata, the order dismissing with prejudice the claims against
5 Saxon (1) bars Plaintiff from pursuing this action; (2) bars
6 Plaintiff's claims against Pacific on statute of limitations
7 grounds; and (3) bars Plaintiff's claims against Pacific on the
8 ground that she has failed sufficiently to state any facts
9 supporting them. Res judicata bars subsequent lawsuits only when
10 there is "(1) an identity of claims; (2) a final judgment on the
11 merits in the first lawsuit; and (3) identity or privity between
12 parties." Western Radio Servs. Co., Inc. v. Glickman, 123 F.3d
13 1180, 1192 (9th Cir. 1997).

14 The Court declines to apply res judicata to Plaintiff's
15 claims against Pacific in this case based on the order in case
16 number C 10-4631 RS, dismissing Plaintiff's claims against Saxon.
17 Furthermore, the claims against Pacific were dismissed without
18 prejudice for failure to prosecute, which is not a final judgment
19 on the merits and is without res judicata effect. See Oscar v.
20 Alaska Dep't of Educ. and Early Dev., 541 F.3d 978, 981 (9th Cir.
21 2008).

22 II. Statute of Limitations

23 Pacific argues that the claims alleged against it are barred
24 by the statute of limitations given that they accrued on August
25 24, 2005, the day Plaintiff signed the deed of trust and the

Adjustable Rate Rider. She filed this complaint on January 21, 2011, more than five years later. The relevant statutes of limitations are summarized as follows: the fourth cause of action, for contractual breach of the implied covenant of good faith and fair dealing, is subject to a two year statute of limitations when predicated on a tort theory, see Archdale v. American Intern. Specialty Lines Ins. Co., 154 Cal. App. 4th 449, 473 (2007) (citing Cal. Civ. Proc. Code § 339), and a four year statute of limitations when predicated on a contract theory, see Frazier v. Metropolitan Life Ins. Co., 169 Cal. App. 3d 90, 102 (1985) (citing Cal. Civ. Proc. Code § 337);³ the fifteenth cause of action, for fraud, is subject to a three year statute of limitations, see Miller v. Bechtel Corp., 33 Cal. 3d 868, 873 (1983) (Code of Civil Procedure § 338 sets forth a three-year limitation period for tort actions based on fraud or mistake); the sixteenth and twentieth causes of action, under California Business and Professions Code section 17200 for unfair and deceptive acts and practices and predatory lending, are subject to a four year statute of limitations, see Cal. Bus. & Prof. Code

³ Pacific contends that the breach of covenant claim is premised on a tort theory of liability because it is based on allegations of misrepresentations and because Plaintiff has not alleged the existence of a contract between Pacific and herself. Plaintiff does not respond to this argument in her opposition and, therefore, must concede that the breach of covenant claim is predicated on a tort theory, which is subject to a two-year statute of limitations.

1 § 17208;⁴ the seventeenth cause of action for breach of fiduciary
2 duty is subject to a three-year statute of limitations if based on
3 fraud, see Cal. Civ. Proc. Code § 338, or a two-year statute if
4 based on professional negligence, see Thomson v. Canyon, 198 Cal.
5 App. 4th 594, 606 (2011) (citing Cal. Civ. Proc. Code § 339(1));
6 all other causes of action are subject to a four-year statute of
7 limitations under California Code of Civil Procedure section 343,
8 which provides that any action that does not have a statute of
9 limitations assigned to it must be commenced within four years
10 after it accrues.

12 Plaintiff does not dispute that she filed her complaint after
13 the statutes of limitations on her claims had run, but argues
14 that, because she only recently discovered the existence of her
15 claims when her loan payments increased, equitable tolling
16 applies. She argues that, based upon the fact that her native
17 language is Tagalog and she speaks little English, she had no way
18 of knowing the significance of the terms in the loan documents.
19 Plaintiff also alleges that she called representatives at the
20 lender and at Pacific who convinced her that she was able to
21 afford the subject loan and failed to explain that the initial
22

24 ⁴ Pacific correctly cites Snapp & Assocs. Ins. Servs., Inc.
25 v. Malcolm Bruce Burlingame Robertson, 96 Cal. App. 4th 884, 891
26 (2002), for the proposition that the discovery rule, which delays
27 accrual of certain causes of action until the plaintiff has actual
28 or constructive knowledge of facts giving rise to the claim, does
not apply to actions under section 17200. However, Snapp stated
that the statute of limitations in section 17200 is subject to
equitable tolling. Id.

1 payment structure was only temporary and payments would soon go up
2 dramatically. Comp. at ¶ 75. She also alleges that she never
3 received required loan documents so she could not conduct her own
4 due diligence. Id.

5 Equitable tolling requires more than just the plaintiff's
6 ignorance of the claims. In general,

7 equitable tolling may be applied if, despite all due
8 diligence, a plaintiff is unable to obtain vital information
9 bearing on the existence of his claim. . . . If a reasonable
10 plaintiff would not have known of the existence of a possible
11 claim within the limitations period, then equitable tolling
will serve to extend the statute of limitations for filing
suit until the plaintiff can gather what information he
needs.

12 Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).

13 For equitable tolling to apply in a mortgage case, plaintiffs
14 would have to allege undisclosed credit terms or fraudulent
15 concealment on the part of the loan originator that prevented them
16 from discovering their claims. Meyer v. Ameriquest Mortg. Co.,
17 342 F.3d 899, 902 (9th Cir. 2003); Ancheta v. Golden Empire

18 Mortg., Inc., 2011 WL 826177, at *3 (N.D. Cal.). District courts
19 in this circuit have split on the applicability of equitable
20 tolling in residential mortgage cases when the loan documents are
21 not translated into the borrower's native language. See Diaz v.
22 Bank of America Home Loan Servicing, 2010 WL 5313417, at *3-4.
23

24 (C.D. Cal.) (noting cases where failure to translate mortgage
25 terms into Spanish for non-English speakers held sufficient to
26 invoke equitable tolling, but following cases denying equitable
27

1 tolling where plaintiffs failed to act diligently to have their
2 loan documents translated or reviewed).

3 Plaintiff alleges more than the failure to translate the loan
4 documents into Tagalog. Her allegations that representatives from
5 Pacific and from the lender made misrepresentations to her about
6 her loan payments and that the originator of the loan withheld
7 loan documents from her support her argument for equitable
8 tolling. However, the allegations are insufficient because she
9 does not specify when or how the change in her loan payments
10 alerted her to her claims against Pacific. The Adjustable
11 Interest Rider indicates that the first interest rate change date
12 was in September, 2007. If that was the date Plaintiff became
13 aware of her claims, the claims with a four-year statute of
14 limitations would be timely, but claims with statutes of
15 limitations of one, two and three years would be precluded.
16

17 Because the complaint does not adequately allege equitable
18 tolling of the statutes of limitations for Plaintiff's claims,
19 Pacific's motion to dismiss is granted, and Plaintiff is granted
20 leave to amend.

22 III. Failure to State a Claim Against Pacific

23 Pacific argues that, with the exception of the fourth cause
24 of action for breach of the implied covenant of good faith and
25 fair dealing and the seventeenth cause of action for breach of
26 fiduciary duty, Plaintiff's complaint fails to allege sufficient
27 facts to state any causes of action against it.

1 A. Claims Not Directed at Pacific as Mortgage Broker

2 As stated above, Pacific is a mortgage broker, an entity that
3 is involved in the marketing and origination of loans. As a
4 result, the following claims against Pacific are dismissed without
5 leave to amend because they are directed at other phases of the
6 mortgage and foreclosure process: (1) Claim Two for injunctive
7 relief to enjoin the sale of the subject property in a foreclosure
8 sale; (2) Claim Three to determine the nature, extent and validity
9 of the lien; (3) Claims Seven through Eleven and Claim Thirteen
10 for violations of various sections of the California Civil Code
11 relating to the lending of money and the duty of a lender to
12 provide notice of how adjustable rate loans work; (4) Claim
13 Fourteen for rescission; and (5) Claims Nineteen and Twenty-one
14 through Twenty-four for unconscionability, quiet title, failure to
15 modify loan, wrongful foreclosure, and a temporary restraining
16 order and preliminary injunction to stop the foreclosure.
17

18 B. Fifth Claim for Violation of Truth in Lending Act

19 The Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 et seq.,
20 was enacted "to assure a meaningful disclosure of credit terms so
21 that the consumer will be able to compare more readily the various
22 credit terms available to him and avoid the uninformed use of
23 credit." Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1169 (9th Cir.
24 2003) (citing 15 U.S.C. § 1601(a)). If required disclosures are
25 not made, the consumer may recover damages or seek to rescind the
26 loan. Id. at 1170; Martinez v. EMC Mortg. Corp., 2009 WL 2043013,
27
28

*5 (E.D. Cal.). The only parties who can be liable for TILA violations are the original creditor and assignees of that creditor. 15 U.S.C. §§ 1640, 1641; Redic v. Gary H. Watts Realty Co., 762 F.2d 1181, 1185 (4th Cir. 1985); Nevis v. Wells Fargo Bank, 2007 WL 2601213, *2 (N.D. Cal.).

Pacific, as the mortgage broker, cannot be held liable under TILA. Therefore, Pacific's motion to dismiss this claim is granted. Dismissal of this claim is without leave to amend, as amendment would be futile.

C. Sixth Claim for Violation of Real Estate Settlement Procedures Act

In her complaint, Plaintiff alleges that Pacific was unjustly enriched because a yield spread premium that was not disclosed to her increased the interest rate of the loan. Comp. at ¶ 87, 89. There are three sections in the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq., that provide a private right of action: (1) § 2605 requires disclosure to a loan applicant of whether the servicing of the loan may be assigned, sold or transferred; notice to the borrower at the time of transfer; and responses by the loan servicer to qualified written requests by the borrower; (2) § 2607 prohibits kickbacks; and (3) § 2608 prohibits sellers from requiring buyers to purchase title insurance on a property as a condition of its sale.

Apparently, Plaintiff alleges her claim under § 2607, which prohibits kickbacks. For violations of § 2607, RESPA provides a

one-year statute of limitations from the date of the occurrence of
the alleged violation. King v. Capitol Commerce Mortg. Co., 2012
WL 90407, *3 (E.D. Cal.). As discussed above, Plaintiff argues
that equitable tolling applies to her claims. It is unlikely that
Plaintiff can overcome the one-year statute of limitations that
applies to this claim. However, this claim is dismissed with
leave to amend.

D. Claim Twelve for Violation of Civil Code § 1632

Plaintiff may be able to state a claim against Pacific under
Civil Code section 1632, which requires any person engaged in a
trade or business who negotiates primarily in one of several
foreign languages, including Tagalog, to provide the other party
to the agreement with a translation of the contract or agreement
in the language in which the contract or agreement was negotiated.
Cal. Civ. Code § 1632(b). Section 1632 applies to the negotiation
of only certain types of contracts and loans, which generally
excludes loans secured by real property. ING Bank, FSB v. Ahn,
717 F. Supp. 2d 931, 933 (N.D. Cal. 2010). However, real property
loans negotiated by a broker and for use primarily for personal,
family or household purposes are covered. Id. (Civil Code
§ 1632(b)(4) extends statute's protection to loans subject to
Business & Professions Code § 10240, which includes real estate
property loans negotiated by real estate brokers). Plaintiff
alleges that her primary language is Tagalog. However, she does
not allege that Pacific primarily negotiates business in Tagalog

1 or that her loan was negotiated in Tagalog. Therefore, this claim
2 is dismissed with leave to amend for Plaintiff to cure these
3 deficiencies, if she truthfully can do so.

4 E. Fifteenth Claim for Fraud

5 Pacific argues that Plaintiff's allegations of fraud are not
6 plead with the required specificity.

7 The elements of fraud under California law are as follows:
8 (1) a misrepresentation; (2) knowledge of the falsity; (3) intent
9 to defraud or to induce reliance; (4) justifiable reliance; and
10 (5) resulting damage. Seeger v. Odell, 18 Cal. 2d 409, 414
11 (1941); Cal. Civ. Code § 1709. The misrepresentation element can
12 be demonstrated by a fraudulent concealment of facts. Outboard
13 Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 37 (1975).

14 In a case that has been removed to federal court, the
15 pleading requirements for a claim of fraud are analyzed under
16 Federal Rule of Civil Procedure 9(b). Vess v. Ciba-Geigy Corp.
17 USA, 317 F.3d 1097, 1103 (9th Cir. 2003) ("It is established law,
18 in this circuit and elsewhere, that Rule 9(b)'s particularity
19 requirement applies to state-law causes of action."). "In all
20 averments of fraud or mistake, the circumstances constituting
21 fraud or mistake shall be stated with particularity." Fed. R.
22 Civ. P. 9(b). The allegations must be "specific enough to give
23 defendants notice of the particular misconduct which is alleged to
24 constitute the fraud charged so that they can defend against the
25 charge and not just deny that they have done anything wrong."

1 Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Statements
2 of the time, place and nature of the alleged fraudulent activities
3 are sufficient, Wool v. Tandem Computers, Inc., 818 F.2d 1433,
4 1439 (9th Cir. 1987), provided the plaintiff sets forth "what is
5 false or misleading about a statement, and why it is false." In
6 re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).

7 Under her cause of action for fraud, Plaintiff alleges:

8 The credit application and or available W-2's provided by
9 Plaintiff was enough, in addition to the application itself
10 for Defendants to know what type of loan should be offered,
11 and what Plaintiff could not afford. Any falsification of a
12 credit application by a broker or seller for the purposes of
securing a loan is de facto fraud.

13 Comp. at ¶ 134.

14 Plaintiff also alleges, "Defendants engaged in the unlawful
15 suppression of facts or circumstances by one of the parties to a
16 contract from the other, for self-serving purposes and financial
17 gain." Comp. at ¶ 135.

18 Plaintiff has not plead her fraud cause of action with
19 sufficient particularity. She makes allegations against
20 "Defendants" without specifying which Defendant and which person
21 in particular made false statements to her or concealed material
22 facts from her. She need not necessarily give the name of the
23 person at Pacific who made misrepresentations to her or concealed
24 material facts from her, but must at least indicate the role or
25 title of the employee and in what context the misrepresentations
26 title of the employee and in what context the misrepresentations
27
28

were made or the facts were concealed. She must also allege that
she justifiably relied on such misrepresentations or omissions.

Accordingly the fraud claim is dismissed with leave to amend
for Plaintiff to remedy the noted deficiencies, if she can
truthfully do so.

F. Sixteenth and Twentieth Claims based on Unfair Competition
Law

Pacific argues that Plaintiff's allegations are insufficient
to state a claim against it under California's Unfair Competition
Law (UCL).

The UCL prohibits any "unlawful, unfair or fraudulent
business act or practice." Cal. Bus. & Prof. Code § 17200. The
UCL incorporates other laws and treats violations of those laws as
unlawful business practices independently actionable under state
law. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042,
1048 (9th Cir. 2000). Violation of almost any federal, state or
local law may serve as the basis for a UCL claim. Saunders v.
Superior Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition,
a business practice may be "unfair or fraudulent in violation of
the UCL even if the practice does not violate any law." Olszewski
v. Scripps Health, 30 Cal. 4th 798, 827 (2003). "A fraudulent
business practice is one in which members of the public are likely
to be deceived." Morgan v. AT&T Wireless Servs., Inc., 177 Cal.
App. 4th 1235, 1254 (2009). A UCL claim based on fraud is subject
to Rule 9(b)'s specificity requirement. Kearns v. Ford Motor Co.,

567 F.3d 1120, 1125-26 (9th Cir. 2009). To amount to an unfair
1 business practice (1) the injury must be substantial; (2) the
2 injury must not be outweighed by any countervailing benefits to
3 consumers or competition; and (3) the injury must be one that the
4 consumer could not reasonably have avoided. Camacho v. Automobile
5 Club of Southern California, 142 Cal. App. 4th 1394, 1402 (2006)
6 (adopting one of three possible definitions of unfair business
7 practice).

In the sixteenth cause of action, Plaintiff alleges that
10 Defendants failed to undertake a diligent underwriting process for
11 her loan, failed to disclose facts and circumstances relating to
12 how the adjustable interest rate would work and placed Plaintiff
13 in a loan which she could not afford. Comp. at ¶ 139. She also
14 alleges that the current loan suffers from the following
15 violations: lack of broker disclosure and mortgage loan
16 origination agreement; lack of lender initial disclosures; flawed
17 underwriting; appraisal fraud; truth in lending disclosure errors;
18 improper notice of right to cancel; payment of yield spread
19 premiums as unearned fee; failure to meet fiduciary duty
20 obligations, and fraudulent misrepresentation of loan terms.
21 Comp. at ¶ 140.

In the twentieth cause of action, Plaintiff alleges that
24 Defendants engaged in predatory lending by marketing the loan
25 without disclosing all of its material terms and by including
26 terms which were unfair, fraudulent or unconscionable. Comp. at
27
28

¶ 159.

From these allegations, it appears that Plaintiff is asserting claims under the fraud and unfair business act prongs of the UCL. In regard to the claim based on fraud or concealment, these allegations suffer from the same deficiency noted above in that they do not specify the role that Pacific played in the misrepresentations or concealment. As stated above, Plaintiff may amend to allege, if she truthfully can do so, who made the misrepresentations to her and failed to disclose material facts such that a member of the public would likely be deceived.

In regard to the claim based on unfair business practices, Plaintiff's allegations, taken as a whole, are sufficient to show that her injury was substantial, that it was not outweighed by any benefits to consumers or competition and that it could not have been avoided. Therefore, Pacific's motion to dismiss this claim under Rule 12(b)(6) is denied. However, for this claim to proceed, Plaintiff must establish that equitable tolling applies.

20 G. Claim Eighteen for Unjust Enrichment

Pacific argues that Plaintiff cannot state a claim for unjust enrichment because it is not a cause of action but rather a general principle underlying various doctrines and remedies.

California courts are split as to whether there is an independent cause of action for unjust enrichment. Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007) (applying California law). One view is that it is a general

principle underlying various legal doctrines and remedies.

McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). Another view is that it is a cause of action and its elements are receipt of a benefit and unjust retention of the benefit at the expense of another. Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726 (2000). Determining whether it is unjust for a person to retain a benefit may involve policy considerations. First Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1663 (1992). For instance, "a customary way of regarding a particular type of transaction may justify the inference that the payor has assumed the risk of mistake." Id.

To support her unjust enrichment claim, Plaintiff alleges that Defendants presented her with a loan agreement with an adjustable interest rate and which called for compensation to Defendants for the life of the loan. In return, Plaintiff expected fair and truthful dealings and disclosures. She alleges that allowing Defendants to recoup their profits from her loan, by a forced sale of her home, would be inequitable.

These allegations are insufficient to state any claim for unjust enrichment against Pacific. Plaintiff does not specify what benefit Pacific received from her loan and why it would be unjust for Pacific to retain that benefit. This claim is dismissed with leave to amend for Plaintiff to remedy these deficiencies, if she truthfully can do so.

1 H. First Claim for Declaratory Judgment

2 The Declaratory Judgment Act permits a federal court to
3 "declare the rights and other legal relations" of parties to "a
4 case of actual controversy." 28 U.S.C. § 2201; see Wickland Oil
5 Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The
6 "actual controversy" requirement of the Declaratory Judgment Act
7 is the same as the "case or controversy" requirement of Article
8 III of the United States Constitution. Am. States Ins. Co. v.
9 Kearns, 15 F.3d 142, 143 (9th Cir. 1993). Under the Declaratory
10 Judgment Act, a two-part test is used to determine whether
11 jurisdiction over a claim for a declaratory judgment is
12 appropriate. Principal Life Ins. Co. v. Robinson, 394 F.3d 665,
13 669 (9th Cir. 2005). First, the court must determine if an actual
14 case or controversy exists within its jurisdiction. Id. Second,
15 if so, the court must decide whether to exercise its jurisdiction.
16 Id.

17 All causes of action have been dismissed on statute of
18 limitations grounds and some have been dismissed for failure to
19 state a claim upon which relief can be granted. Because all
20 claims have been dismissed, there is no case or controversy
21 between Plaintiff and Pacific. Therefore, Pacific's motion to
22 dismiss the claim for declaratory relief is granted. However,
23 because Plaintiff has been granted leave to amend some of her
24 claims, the dismissal of this claim is also with leave to amend.
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CONCLUSION

For the foregoing reasons, Pacific's motion to dismiss Plaintiff's claims against it is granted. The claims that are dismissed without leave to amend for failure to state a claim upon which relief may be granted cannot be reasserted against Pacific in an amended complaint. The claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty and the UCL claim based on unfair business practices are sufficiently plead, but are dismissed with leave to amend for Plaintiff sufficiently to allege equitable tolling. The following claims are dismissed with leave to amend for failure to state a claim and for failure sufficiently to allege equitable tolling: (1) RESPA; (2) violation of California Civil Code section 1632; (3) fraud; (4) UCL claim based upon fraud; (5) unjust enrichment; and (6) declaratory relief.

If Plaintiff chooses to file an amended complaint, she must do so within two weeks from the date of this order. If she does not file an amended complaint within this time, her claims against Pacific will be dismissed for failure to prosecute. There is one claim against Saxon remaining in this case. The case management conference scheduled for February 22, 2012 is vacated. The Court will schedule another case management conference at a later date,

1 once it has been determined whether Plaintiff may proceed on any
2 of her claims against Pacific.

3 IT IS SO ORDERED.
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5 Dated: 2/3/2012
6


CLAUDIA WILKEN
United States District Judge